92-1774

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

REGINALD T. HUEY,

Petitioner,

v.

DONNA E. SHALALA, Secretary of Health and Human Services,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Civil Rights Act of 1991 applies retroactively to cases pending in court on the date of its enactment, so as to entitle plaintiff Huey to an award of interest and expert witness expenses?

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REGINALD T. HUEY,

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DONNA E. SHALALA, Secretary of Health and Human Services,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on July 30, 1991, is reported as Case No. 91-2908WM.

JURISDICTIONAL STATEMENT

The Opinion of the Eighth Circuit Court of Appeals, rendered en banc, was entered on July 30, 1992. Petitioner filed a Rule 40 Petition for Hearing and a Rule 35(b)

Suggestion for Hearing En Banc. Said Petition and Suggestion were denied on January 28, 1993.

The jurisdiction of this Court is involved under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 114 of the Civil Rights Act of 1991 specifically allows awards of interest on backpay in cases against federal agencies. Also, § 113 of the Civil Rights Act of 1991 specifically allows the award of expert fees in Title VII actions.

STATEMENT OF THE CASE

Plaintiff Reginald T. Huey is a black citizen of the United States of America, residing in Kansas City, Wyandotte County, Kansas. He has been employed by the Social Security Administration since August, 1963. This lawsuit pertains to unlawful employment practices in the form of discrimination against him based upon race and retaliation.

Mr. Huey has now fought a 13-year legal battle (since June 12, 1978) in which the Equal Employment Opportunity Commission has found race discrimination, the Federal District Court has upheld that finding, and an order has been entered directing promotion to a Grade 12 position with back pay, benefits, and attorney's fees. The following explanation sets out the history of plaintiff Huey's long struggle in the justice system although the

issues before this Court deal more simply with the retroactivity of the Civil Rights Act of 1991.

A. ***Initial Complaint.*** Plaintiff Huey's June 20, 1978 complaint alleged that he was discriminated against on the basis of race (black) and reprisal when he was not selected for promotion to any of twelve (12) positions in the Social Security Administration. He also alleged that he had been the victim of "continuous" discrimination since August, 1976 in various ways.

B. ***Final Agency Decision – I.*** In its initial final Agency decision dated February 25, 1980 (FAD One), the Social Security Administration found no discrimination or reprisal with respect to all allegations raised in the complaint. Plaintiff appealed FAD One to the Equal Employment Opportunity Commission (EEOC).

C. ***EEOC Decision – I.*** On December 5, 1980, EEOC remanded FAD One to the Agency for further investigation because there was no objective evidence supporting the actual treatment of appellant with respect to the promotions. EEOC's decision found that, concerning six of the positions for which the Agency had deemed plaintiff unqualified, there was insufficient evidence regarding whether plaintiff was given proper credit for his management experience as compared to management credit given to other similarly situated employees. For the six remaining positions, EEOC found the evidence insufficient because there was no comparative data, including SF-171 Forms, position descriptions, vacancy announcements or any other documentation evidencing any of the candidates' respective qualifications.

D. ***Agency's Supplemental Investigation.*** In the course of the Agency's supplemental investigation after the EEOC's remand of FAD One, the Agency confessed that it had purged its records with respect to three positions, but that among the six candidates selected (each vacancy apparently had two positions) were one Asian-American and five white Americans. The Agency's Chief of Personnel stated that the promotion packages for three other positions had been destroyed after two years, pursuant to Agency policy. He also stated that the promotion records for the remaining positions had also been destroyed. Consequently, the Investigator determined that he could not "construct what happened in each selection and therefore was unable to comply with the (Commission's) remand decision."

E. ***Final Agency Decision – II.*** In its second final Agency decision issued in March, 1983 (FAD Two), the Agency rejected plaintiff's allegations with respect to his nonselection for seven of the positions as untimely. With respect to plaintiff's allegations regarding the remaining five positions and two reprisal allegations, the Agency found no discrimination or reprisal.

F. ***EEOC Decision – II.*** Plaintiff appealed FAD Two to the Equal Employment Opportunity Commission. On appeal, EEOC affirmed the Agency's rejection of plaintiff's allegations regarding his nonselection for seven of the positions. The EEOC then discussed the remaining five positions for which plaintiff was not selected, and ordered that he should be promoted to the position of his choice from among the five positions: Social Insurance Program Specialist, Process Module Manager, Executive

Assistant to the Principal Regional Official, Social Insurance Program Analyst, and Supervisory Quality Appraisal Specialist.

G. ***Selection of Position.*** Following the decision by EEOC, the plaintiff on March 24, 1986, by letter directed to the Department of Health and Human Services, selected position J Vacancy Announcement #21-78 Executive Assistant to the Principal Regional Official GS-301-12/13 effective April 13, 1986. In conformity with 5 C.F.R. Section 550.804, plaintiff requested back pay at the GS-301-12 level for one year and back pay at the GS-301-13 level for subsequent years thereafter in accordance with career-ladder promotion procedures.

H. ***Agency's Request to Reopen.*** On April 15, 1986, the Agency filed a request to reopen the EEOC decision. EEOC did reconsider the issue of plaintiff's placement in a specific position of his choice. After review, the Agency was directed to take action in accordance with the Order contained in the EEOC's second decision; however, paragraph A of the previous Order was modified to read as follows:

> A. In accordance with 29 C.F.R. § 1613.271(b)(1), the Agency is ordered to immediately and retroactively promote plaintiff to a Grade 12 position which is substantially equivalent to any one of the positions of Social Insurance Program Specialist, Process Module Manager, Executive Assistant to the Principal Regional Official, Social Insurance Program Analyst, or Supervisory Quality Appraisal Specialist.

> It is further directed that plaintiff be awarded all back pay and benefits which he would have received had there not been discrimination, from the date plaintiff should have been promoted to the date he is promoted. Back Pay shall be computed in the same manner as prescribed on 5 C.F.R. § 550.805. Reasonable attorney's fees shall be awarded in accordance with 29 C.F.R. § 1613.271(c).

I. ***District Court Complaint.*** Plaintiff Huey filed his District Court Complaint on June 30, 1987, seeking interest on the back pay award, attorney's fees, accountant expense, and appointment to the position of Executive Assistant to the Principal Regional Officer GS-301 12/13, effective April 13, 1986.

J. ***The District Court's December 20, 1989 Order.*** The District Court's December 20, 1989 Order held as follows:

> (1) Plaintiff had the right to file the lawsuit within the 30-day period stated in the EEOC decision in order to implement that decision's terms or to seek further relief from the Court.
>
> (2) The evidence was insufficient to support a finding and conclusion that the position to be designated by the defendant would include a position under which the plaintiff would be entitled to an automatic promotion in the year 1979 as the plaintiff contends.
>
> (3) The parties shall attempt to reach an agreement as to the amount of attorney's fees to be awarded.

(Joint Appendix, p.12).

K. ***The District Court's November 20, 1990 Order.*** This Order held as follows:

(1) *Interest on the Back Pay Award* – The District Court found that plaintiff was not entitled to interest on back pay.

(2) *Attorney's Fees* – Plaintiff is entitled to attorney's fees incurred during the administrative proceedings on his employment discrimination claim prior to commencement of suit in the District Court and attorney's fees incurred in litigation of the claim in this court from commencement of the suit on June 30, 1987 through February 8, 1989, the date when partial summary judgment was entered for plaintiff on the issue of de novo review of his racial discrimination claim.

(3) *Accountant Expense* – The District Court found that the accountant's fees were not taxable as part of plaintiff's costs.

(Joint Appendix, p.79).

L. ***The District Court's May 15, 1991 Order.*** This reaffirmed certain prior orders and directed the defendant to "offer plaintiff a position at the GS-12 level which is substantially equivalent to the positions identified at page six of the EEOC's May 26, 1987 decision with the exception of the 'Executive Assistant to the Principal Regional Official' position; specifically, Social Insurance Program Specialist, Process Module Manager, Social Insurance Program Analyst, or Supervisory Quality Appraisal." The court ordered $50,482.72 in back pay,

$6,976.25 in attorney's fees. (Joint Appendix, p.94). The back pay award was increased to $53,022.72 by the court's June 19, 1991 Amended Judgment. (Joint Appendix, p.110).

NOTE: The issues of whether the offer made was truly in "good faith" and "substantially equivalent" to one of the enumerated positions must be the subject of evidentiary proceedings upon remand. This Court is asked to remand this cause for those further proceedings.

M. ***The Eighth Circuit's July 30, 1992 Opinion Denied Both Interest On the Backpay Award and Certain Expert Witness Expenses (Accountant).*** In both instances, the holding was based upon an interpretation that the Civil Rights Act of 1991 is not retroactive. Section 114 of the 1991 Civil Rights Act would entitle Huey to interest on his backpay award. Furthermore, Section 113 of the 1991 Civil Rights Act allows for the shifting of expert fees. These two forms of relief are what plaintiff has been denied by the prospective-only interpretation of the Eighth Circuit.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER THE CIVIL RIGHTS ACT OF 1991 APPLIES RETROACTIVELY TO CASES PENDING IN COURT ON THE DATE OF ITS ENACTMENT.

There are three basic reasons why the Court should grant certiorari on this important issue. First, the Eighth

Circuit's ruling on the Civil Rights Act of 1991's non-retroactivity is clearly wrong on the merits. Therefore, it must be corrected by the Court. Second, the Eighth Circuit's ruling conflicts with the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F. 2d 1536, 1549-1556 (9th Cir. 1992). The Court should grant certiorari in this case to resolve the conflict among the Circuits. Third, the Court has recently granted certiorari in two cases which squarely raise the retroactivity issue. This development shows that the retroactivity of the Civil Rights Act is an important legal issue which warrants review by the Court. Each of these three reasons for granting certiorari will be discussed in turn.

The practical difference of all this for plaintiff is that a retroactivity ruling would entitle him to certain additional relief. Specifically, he would be entitled to an award of interest and certain expert witness expenses.

1.

According to the Eighth Circuit, there is no evidence Congress wanted the Civil Rights Act of 1991 to operate retroactively. Plaintiff Huey disagrees. The Eighth Circuit failed to discuss, let alone follow, two well-settled rules of statutory interpretation which show that Congress wanted the Civil Rights Act to operate retroactively with two minor exceptions not relevant to the case at bar.

At issue is the meaning of Section 402(a) of the Act. Section 402(a) does not merely provide that the statute will take effect upon enactment. Rather, it provides that "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect on

enactment." The statutory phrase "Except as otherwise specifically provided" is highly significant. It can only refer to Section 402(b) and Section 109(c) of the Act since these are the only two sections of the statute which specify which they will take effect. Section 402(b) expressly forbids retroactive application of the statute to the pre-enactment conduct of the employer in the ongoing case of *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Similarly, Section 109(c) expressly forbids retroactive application of the statute to the pre-enactment conduct of employers in cases brought under Title VII by American employees working for American companies in foreign countries.

These two sections show that Congress obviously knew how to provide for prospective-only operation of the statute. Significantly, Congress refused to provide for prospective-only operation of the Act in the remainder of the statute. It is a well-settled rule of statutory interpretation that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983). By denying retroactivity in the particular circumstances described in Sections 402(b) and 109(c), Congress clearly indicated that the balance of the statute was to be applied retroactively. *See*, e.g., *In Re Salem Mortg. Co.*, 783 F. 2d 626, 631 n. 14 (6th Cir. 1986). There is no escape from the conclusion that Congress wanted the Civil Rights Act to operate retroactively except as otherwise specifically provided in Section 402(b) and Section 109(c).

There is a second well-settled rule of statutory interpretation which illuminates the intent of Congress. As this Court has recently reaffirmed, a court must construe a statute so that no part of it is rendered insignificant or inoperative, redundant or superfluous. *U.S. v. Nordic Village, Inc.*, 117 L.Ed. 2d 181, 189 (1992). Some purpose must be ascribed to Section 402(b) and Section 109(c). The Eighth Circuit's reading of the statute, however, leaves them purposeless.

According to the Eighth Circuit, there is no evidence Congress wanted the provisions of the Civil Rights Act of 1991 to apply retroactively to cases pending in court on the date of its enactment. But why would Congress bother to exempt one pending case – the *Wards Cove* case – from the coverage of the statute unless it wanted the statute as a whole to apply to pending cases? Moreover, why would Congress bother to exempt a class of pending cases – those brought under Title VII by American employees working for American companies in foreign countries – from the coverage of the statute unless it wanted the statute as a whole to apply to pending cases? These statutory exemptions would be unnecessary if, as the Eighth Circuit suggests, the statute in general does not apply retroactively to pending cases. Taken seriously, the Eighth Circuit's interpretation renders Section 402(b) and Section 109(c) insignificant and inoperative, redundant and superfluous. They serve no independent function. Indeed, they amount to meaningless statutory graffiti. There is something profoundly wrong with any interpretation of a statute which assumes that Congress has done a completely useless and pointless thing. *Kungys v. U.S.*, 485 U.S. 759, 778-779 (1988). Plaintiff

Huey's interpretation, on the other hand, makes sense of the statute as a whole by giving effect to all of its provisions. His interpretation must be accepted because it ascribes a very clear purpose and function to Section 402(b) and Section 109(c): they serve as exceptions to the general rule of retroactivity set forth in Section 402(a). *See, Davis v. City and County of San Francisco*, 976 F. 2d 1536, 1549-1556 (9th Cir. 1992).

Significantly, this Court has held that Congress is presumed to legislate with knowledge of these basic rules of statutory interpretation. *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 889, 898 (1991). So it is a proper assumption given the way it wrote and structured the Civil Rights Act, that Congress wanted the statute to operate retroactively. The Eighth Circuit's conclusion to the contrary seriously misreads the intent of Congress and cannot be allowed to stand.[1]

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[1] The Eighth Circuit at least implicitly concluded that Congress could not agree on whether the provisions of the Civil Rights Act should be retroactive or prospective [with the exceptions of Section 402(b) and Section 109(c)] and therefore left it up to the courts to decide. The problem with this conclusion, however, is that it is based on speculation. Although the remarks of some members of Congress support the Eighth Circuit's conclusion, the remarks of other members of Congress clearly refute it. *See*, e.g., 137 Cong. Rec. H9548 (Rep. Hyde); 137 Cong. Rec. S15966 (Sen. Durenberger); 137 Cong. Rec. H9530 (Rep. Edwards). The legislative history, in other words, is hopelessly contradictory. Under these circumstances courts must stick to the *text* of the Civil Rights Act, and the reasonable inferences to be drawn from it, in analyzing Congressional intent. The legislative history of the Act can, and should, be ignored. *Green v. Bock Laundry Co.*, 109 S.Ct. 1981, 1994 (1989) (Scalia, J., concurring).

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) does not mandate that a court must presume, when the intent of Congress is unknown, that Congress intends a newly-enacted statute to apply prospectively. Mindlessly applying a rule of law, without regard to its purpose, is intolerable. The legal presumption of prospectivity set forth in *Bowen* to support its conclusion that the Civil Rights Act does not apply retroactively neglects to consider the *purpose* behind the *Bowen* rule of law. As Justice Scalia has explained, the legal presumption that Congress intends its legislation to operate prospectively "gives effect to enduring notions of what is fair" and thus accords with probable legislative intent. *Kaiser v. Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1587 (1990) (Scalia J., concurring). Absent unfairness, there is no reason to presume that Congress wants a newly enacted statute to operate prospectively. On the contrary, there is every reason to presume the exact opposite: that Congress wants the statute to operate retroactively. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). After all, the policy considerations which prompted Congress to enact the legislation will be furthered, rather than frustrated, if the legislation is given immediate effect in pending litigation. *U.S. v. Angiulo*, 755 F. 2d 969, 971 (1st Cir. 1985). Because the Eighth Circuit failed to apply a fairness analysis, which is implicit in *Bowen*, its opinion must be set aside. *See, Gersman v. Group Health Ass'n., Inc.*, 975 F. 2d 886, 900-915 (D.C. Cir. 1992) (Wald J., dissenting).

A retroactive statute is unfair only when it renders conduct unlawful which, when it was done, was lawful. *Ralis v. RFE/RL, Inc.*, 770 F. 2d 1121, 1127 (D.C. Cir. 1985).

That is not the situation here. Applying the Civil Rights Act to this case will not render unlawful any conduct which was, when it was done, lawful.

2.

The Eighth Circuit's ruling in this case directly contradicts the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F. 2d 1536 (9th Cir. 1992). In *Davis*, the Ninth Circuit carefully analyzed the text and structure of the Civil Rights Act and concluded that Congress intended the Act to operate retroactively. *Id.* at 1549-1556. The Eighth Circuit's analysis herein is directly contrary to the Ninth Circuit's analysis. As a result, there exists a conflict among the Circuits over the interpretation of the Act which requires authoritative resolution by this Court.

This conflict among the Circuits is sufficient reason, by itself, to grant certiorari in this case. The Civil Rights Act of 1991 is a landmark statute. Whether it does, or does not, apply to thousands of Section 1981 and other civil rights cases currently pending in the federal court system is a question of exceptional national importance. For this reason alone, plaintiff Huey's petition for certiorari should be granted. *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965) (certiorari granted because of a conflict among the Circuits and the fact that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues").[2]

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[2] Although the majority of Circuits have held that the Civil Rights Act does not apply retroactively, they have often done so

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Finally, it is crucial to point out that this Court has recently granted certiorari in two cases which squarely raise the issue of the retroactivity of the Civil Rights Act of 1991: (1) *Landgraf v. U.S.I. Film Industries*, 968 F. 2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993) and (2) *Rivera v. Roadway Express*, 973 F. 2d 490 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993). The course of action the Court should follow under these circumstances is clear enough:

"Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision."

See Stern, Gressman and Shapiro, Supreme Court Practice, § 4.16 at p. 221 (Sixth Ed. 1986). The Court should grant certiorari in this case or, alternatively, hold the case in abeyance pending an authoritative resolution of the retroactivity issue in the *Landgraf* and *Rivera* cases.

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over vigorous and well-reasoned dissenting opinions. *See*, e.g., *Gersman v. Group Health Ass'n., Inc.*, 975 F. 2d 886, 900-915 (D.C. Cir. 1992) (Wald, J. dissenting); *Fray v. Omaha World Herald Co.*, 960 F. 2d 1370, 1379-1382 (8th Cir. 1992) (Heaney, J. dissenting); *Mozee v. American Marine Service Co.*, 963 F. 2d 929, 940-941 (7th Cir. 1992) (Cudahy, J., dissenting).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case with directions to enter judgment in favor of plaintiff Huey.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit (July 30, 1992).

FROM

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 91-2908WM

Reginald T. Huey, Appellant,	*	Appeal from the United States District Court for the Western District of Missouri.
v.	*	
Louis W. Sullivan, M.D., Secretary of Health and Human Services, Appellee.	*	

Submitted: March 10, 1992

Filed: July 30, 1992

Before WOLLMAN and MAGILL, Circuit Judges, and WOODS,* District Judge.

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* THE HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

MAGILL, Circuit Judge.

Reginald Huey appeals the district court's[1] order denying him interest on a back pay award that he received as a result of a successful race discrimination claim. Huey also challenges the district court's refusal to grant him accountant's expenses and a portion of his attorney's fees. We affirm.

I.

Huey and his employer, the Social Security Administration (the Agency), have been engaged in a thirteen-year legal battle stemming from the Agency's failure to promote Huey to twelve different GS12 positions for which he was qualified. As required by federal law, Huey first brought his claim of race discrimination before the Agency. When the Agency found no discrimination, Huey appealed the finding to the Equal Employment Opportunity Commission (EEOC) which remanded to the Agency for further investigation. On remand, the Agency concluded that Huey's allegations with respect to seven of the positions were untimely. With respect to the remaining five positions, the Agency found no discrimination. The Agency's supplemental investigation also revealed that numerous records relating to the promotions had been destroyed. Huey again appealed to the EEOC which upheld the Agency's finding that seven of

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[1] The Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri.

Huey's allegations were untimely. The EEOC, however, reversed the Agency's finding of no discrimination with respect to the other five positions. The EEOC concluded that Huey had made out a prima facie case of discrimination because the Agency conceded that Huey was eligible for the five promotions, and that those given the promotions were not black. The EEOC also found that although the Agency had shown a legitimate, nondiscriminatory reason for not selecting Huey, the Agency's own actions in destroying records prevented Huey from proving that the Agency's asserted reason was a pretext. Because the Agency had a duty to preserve or reconstruct these records, the EEOC applied an adverse inference and assumed that Huey met his burden of showing pretext.

Pursuant to its authority to issue a final decision requiring the employing agency to take corrective action,[2] the EEOC ordered the Agency to promote Huey to the position of his choice from among the five positions he had been denied, to pay him back pay based on the increased salary he would have received if he had been promoted to a GS-12 position, and to pay him attorney's fees. Huey then selected the position of Executive Assistant to the Principal Regional Office. Because the Agency had redefined this position in the years since Huey had originally applied for it, the Agency challenged Huey's

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[2] The role of the EEOC in remedying discrimination by federal employers is significantly different than its role in discrimination actions against private employers. *See Moore v. Devine*, 780 F.2d 1559, 1562-63 (11th Cir. 1986). Only in discrimination actions by federal employees is the EEOC empowered to enter final orders binding the employing agency. 42 U.S.C. § 2000e-16(b) (1988); 29 C.F.R. § 1613.234-.237 (1991).

right to receive this position and moved to reopen the EEOC decision. The EEOC granted this request, and altered its order to require the Agency to promote Huey to a GS-12 position which is substantially equivalent to any one of the five positions the Agency had previously denied Huey. This order gave the Agency, rather than Huey, the right to choose the specific position Huey would receive.

As allowed by law, Huey then brought a Title VII action in federal district court seeking enforcement of the EEOC's order. Huey also sought additional relief, including appointment to the position of his choice, back pay calculated at a GS-12 level for one year and at a GS-13 level for all succeeding years, and interest on the back pay award. Finally, Huey sought accountant's expenses incurred for calculation of the back pay amount and attorney's fees incurred at the district court level. The Agency argued that the district court could not award Huey relief beyond what the EEOC had ordered without retrying the issue of liability de novo. It conceded, however, that the court is bound by the EEOC's order with respect to its enforcement. On February 8, 1989, the district court granted Huey summary judgment on the issue of liability, rejecting the Agency's argument that it was entitled to de novo review before the court could grant additional relief. After further proceedings, the court rejected Huey's claims for relief beyond that awarded by the EEOC. It did, however, grant Huey attorney's fees for work up to the grant of partial summary judgment on February 8, 1989. Huey now appeals the district court's denial of interest on the back pay award, accountant's expenses, and attorney's fees incurred after February 8,

1989. The Agency claims that the district court proceedings are not final, and thus this court lacks jurisdiction to hear the appeal. We conclude that we have jurisdiction, and affirm the district court's order in all respects.

II.

A. Jurisdiction

We first address the Agency's claim that we lack jurisdiction to hear the appeal. The United States courts of appeals have jurisdiction only over final decisions of the district courts.[3] 28 U.S.C. § 1291 (1988). Generally, a district court decision is final when the court "has rendered a decision that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Thomas v. Basham*, 931 F.2d 521, 523 (8th Cir. 1991) (citing *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766, 769 (8th Cir. 1989)). The Agency argues that the district court proceedings are not final because the court retained jurisdiction to review any questions that arise regarding the Agency's good faith assignment of a GS-12 position to Huey as required by the judgment. Any subsequent action brought before the district court regarding the Agency's compliance with the judgment, however, clearly is related to execution of the judgment. We do not believe that retention of jurisdiction to oversee execution of the judgment prevents the district court's decision on the merits from becoming final. *See Brown Shoe Co. v. United*

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[3] There are limited exceptions to this rule not applicable here.

States, 370 U.S. 294, 304-10 (1962) (finding appellate jurisdiction even though the court had not yet developed a specific plan for carrying into effect its divestiture order). We thus find that we have jurisdiction to address the merits of this appeal.

B. Interest on Back Pay Award

Huey argues that he is entitled to interest on his back pay award either under the Back Pay Act, 5 U.S.C. § 5596 (1988), or under § 114 of the Civil Rights Act of 1991. We reject both these arguments. First, even assuming that the interest provisions of the Back Pay Act can supplement the relief available to a prevailing plaintiff under Title VII, we do not believe that these provisions entitle Huey to interest. In 1987, Congress amended the Back Pay Act to allow interest on back pay awards. 5 U.S.C. § 5596(b)(2). Under these amendments, an employee is entitled to interest only if the decision awarding the employee back pay was rendered on or after December 22, 1987. Pub. L. No. 100-202, § 101(m) [Title VI, § 623(b)] (1987) (reprinted in the historical and statutory notes of 5 U.S.C. § 5596). The Agency argues that the decision awarding Huey back pay was made on May 26, 1987, well before the effective date of the amendments. We agree. On May 26, 1987, the EEOC entered its final decision in the discrimination action, granting Huey back pay based on a GS-12 pay schedule. Neither Huey nor the Agency ever challenged this award. Although Huey sought to increase this award in his subsequent court action, the district court denied this relief. Thus, the only decision awarding Huey back pay was the one made by the EEOC on May 26, 1987. Although the district court did agree to

enforce this award, subsequent enforcement action does not alter the date that the award was made. *See Gonzales v. Dep't of the Treasury*, 46 M.S.P.R. 75 (M.S.P.B. Sept. 18, 1990); *Greene v. Dep't of Health & Human Servs.*, 42 M.S.P.R. 192 (M.S.P.B. Oct. 27, 1989). Second, we do not believe that § 114 of the 1991 Civil Rights Act entitles Huey to interest on his back pay award. This section waives sovereign immunity to awards of interest under Title VII. It specifically states that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079 (1991) (codified at 42 U.S.C. § 2000e-16(d)). The Agency paid Huey his back pay award prior to the effective date of the 1991 Act. Accordingly, any award of interest on the back pay would be a retroactive application of § 114. Congress did not specify whether courts should retroactively apply this provision. This circuit, however, recently concluded that another provision of the Civil Rights Act does not apply retroactively. *See Fray v. Omaha World-Herald Co.*, No. 91-2439, slip op. at 10-16 (8th Cir. Apr. 3, 1992) (holding that § 101 is not retroactive); *see also Vogel v. City of Cincinnati*, No. 91-3474 (6th Cir. Mar. 13, 1992) (holding that Civil Rights Act of 1991 not retroactive). We believe that the reasoning of *Fray* is equally applicable to retroactive applications of § 114. Additionally, the policy requiring that waivers of sovereign immunity be construed strictly in favor of the United States, *e.g.*, *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983), makes a finding of no retroactivity even more

compelling in this case. Accordingly, we uphold the district court's denial of interest on Huey's back pay award.[4]

C. Accountant's Expenses

Huey also contends that he is entitled to reimbursement for accountant's expenses incurred to calculate the amount of his back pay award. At the time Huey incurred these expenses, Title VII provided that "a court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs, and . . . the United States shall be liable for costs the same as a private person."[5] 42 U.S.C. § 2000e-5(k) (1988). The Supreme Court has squarely rejected the argument that "attorney's fees" include expert fees. *West Virginia Univ. Hosps. v. Casey*, 111 S. Ct. 1138, 1143 (1991). Additionally, "costs," as defined by 28 U.S.C. § 1920 (1988), do not include expert fees except when the expert acts as a witness or is appointed by the court. *Id.* at 1141 ("None of the categories of expenses listed in § 1920 can reasonably be read to

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[4] Given that the back pay award was paid prior to the 1991 Act's effective date and the expert fees, discussed later in this opinion, also were incurred prior to this date, this court's decision in this case is consistent with *Simmons v. Lockhart*, 931 F.2d 1226, 1228-30 (8th Cir. 1991).

[5] Section 113 of the Civil Rights Act of 1991, Pub. L. No. 102166, § 113, 105 Stat. 1071, 1079 (codified at 42 U.S.C. § 2000e5(k)), amended this provision to allow for the shifting of expert fees. Huey, however, incurred his expert fees prior to the effective date of this Act and we do not believe that this provision applies retroactively. *See Fray*, No. 91-2439, slip op. at 10-16; *Ardestani*, 112 S. Ct. at 520 (waivers of sovereign immunity must be strictly construed in favor of the United States).

include fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity."). Neither of these exceptions apply to Huey's claim for accountant's expenses. Thus, unless there is some other statutory basis for awarding Huey accountant's expenses, the district court's order is correct.

Huey argues that § 2412(d) of the Equal Access to Justice Act (EAJA) provides the necessary statutory authorization for an award of expert fees. This provision provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States *fees and other expenses* . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1) (A) (1988) (emphasis added). The EAJA defines "fees and other expenses" as including the "reasonable cost of any study [or] analysis." *Id.* § 2412(d)(2)(A). The Supreme Court has stated that "the reasonable cost of a 'study' or 'analysis' . . . is but another way of describing nontestimonial expert services." *West Virginia Univ. Hosps.*, 111 S. Ct. at 1143. Accordingly, if this provision applies to Huey's Title VII action, he is entitled to reimbursement for accountant's expenses.

We conclude that § 2412(d) does not apply to Title VII actions. *Cf. EEOC v. Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th Cir. 1983) (holding that attorney's fee provisions of

the EAJA do not apply to Title VII actions). Congress expressly qualified the application of this provision in two ways. First, the provision begins with the phrase "[e]xcept as otherwise specifically provided by statute." Second, Congress enacted a separate savings provision which provides:

> [N]othing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, *alters, modifies,* repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

Equal Access to Justice Act, Pub. L. No. 96-481, § 206, 94 Stat. 2330 (1980), *amended by* Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985) (emphasis added). To "alter" or "modify" means to change or make different. Webster's II Dictionary 96, 762 (1984). The savings provision in no way qualifies the type of change that it prohibits. Accordingly, we interpret this provision as prohibiting § 2412(d) from either narrowing or broadening the award of fees allowed by other provisions of federal law. Because Title VII allowed courts to shift only attorney's fees, application of § 2412(d) to Title VII actions would "alter" or "modify" its fee shifting provision by allowing courts also to award expert fees.

This interpretation is supported by the legislative history of the EAJA which provides:

> [S]ubsection [2412(d)] applies to all civil actions except . . . those already covered by existing fee-shifting statutes. . . . Moreover, this section is

> not intended to replace or supersede any existing fee-shifting statutes such as . . . the Civil Rights Acts . . . or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S.C.C.A.N. 4992, 4997. At the time EAJA was enacted, Title VII already authorized specific fee awards against the federal government. Accordingly, we uphold the district court's denial of accountant's expenses.

D. Additional Attorney's Fees

Finally, Huey claims that he is entitled to attorney's fees incurred after February 8, 1989. Under Title VII, Huey is entitled to attorney's fees only if he is a "prevailing party." 42 U.S.C. § 2000e-5(k). The Supreme Court has stated that "respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). "[A]t a minimum, to be considered a prevailing party . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989). We agree with the district court that Huey did not prevail on any issue going to the merits of his claim after February 8, 1989. The district court found against Huey on his claim for additional relief, and we affirm. Huey's argument that he is a prevailing party because the district court found that it had jurisdiction to

hear the lawsuit and retained jurisdiction to oversee the Agency's execution of the judgment is entirely without merit. Establishing jurisdiction is a procedural victory that does not justify fee shifting. *See Hanrahan v. Hampton*, 446 U.S. 754, 759 (1980) (per curiam) (procedural and evidentiary rulings may affect the disposition on the merits, but are themselves not matters on which a party can "prevail" for purposes of shifting counsel fees).

III.

In conclusion, we affirm the district court's denial of interest on the back pay award, accountant's expenses, and additional attorney's fees.[6]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[6] Our disposition of this appeal leaves the district court free to enforce the judgment, including ruling on Huey's application for review of the position offered to him by the Agency. In fact, we question whether it was necessary for the court to forego ruling on this application while this appeal was pending. *See. e.g., NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (even though appeal is pending, "district court has jurisdiction to enforce its judgment so long as the judgment has not been stayed or superseded"); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986) (same).

IN THE UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

REGINALD T. HUEY, Plaintiff	:	
vs.	:	No. 87-0579-CV-W-JWO-3
LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, Defendant.	:	

ORDER

(Filed Nov. 20, 1990)

The parties in the above case have filed with the Court briefs on the issues of attorney's fees, accounting costs and interest claimed by plaintiff as the result of this Court's Orders enforcing a final determination by the Equal Employment Opportunity Commission (EEOC) finding for plaintiff on his claims of racial discrimination in his employment with defendant Department of Health and Human Services. A brief procedural history of this case is necessary as a prelude to the Court's finding on the issues presently pending.

Procedural History

On May 26, 1987, the EEOC entered its final decision on plaintiff's racial discrimination claim against defendant. The decision found that defendant had discriminated against plaintiff in his federal employment and

ordered defendant to promote plaintiff retroactively to a position to which he had been entitled, or one substantially equivalent. The EEOC order likewise awarded backpay, benefits and attorneys fees to plaintiff.

On June 30, 1987, plaintiff filed his civil action in this Court pursuant to federal law, seeking enforcement of the EEOC decision as to discrimination but further requesting the Court to direct a remedy greater than that ordered by EEOC. Specifically, plaintiff sought retroactive promotion to a position with defendant agency at a GS-12/13 level rather than at a GS-12 level and additional backpay computed at the higher grade for most of the relevant period of discrimination. Plaintiff also sought interest on the backpay award, attorney's fees and costs.

On February 8, 1989, the Court entered an Order granting plaintiff's partial motion for summary judgment on the sole issue of defendant's liability for racial discrimination as found by the EEOC. Contrary to defendant's position, the Court found that a trial *de novo* on the liability issue was not a necessary prerequisite to the Court's determination of the adequacy of the EEOC-ordered remedy. The February 8 Order left only one issue remaining for resolution by the Court: whether the EEOC order of promotion to a GS-12 level was adequate to remedy the racial discrimination to which plaintiff had been subjected by defendant agency.

On December 20, 1989, the Court entered its Order granting defendant's motion for summary judgment on the remedy adequacy issue and denying plaintiff's motion for summary judgment which sought the additional promotional level as part of the remedy. That Order

directed the parties to submit a proposed form of judgment in compliance with the Court's summary judgment Order which judgment was to have included a provision retaining jurisdiction of the Court to determinate any future questions of defendant's good faith in assigning plaintiff to the GS-12 position ordered. The Court further directed the parties to attempt agreement on the amount of attorney's fees to which plaintiff was entitled and include that amount in the proposed judgment.

The parties were unable to agree on the attorney's fees issue or on the issues of accountant fees incurred by plaintiff during the litigation, interest on backpay and costs. Accordingly, on March 19, 1990 an Order was entered directing the parties to schedule briefs on those issues. Following the death of Judge Oliver, this division of the Court was assigned the case, a conference was held and the parties directed to comply with the March 19 Order. The Court has reviewed the parties' briefs on the issues of attorney's fees, accountant fees and interest and concluded that plaintiff may recover partial attorney's fees but is not entitled to a judgment for accountant fees or interest. The Court will address each of these issues separately in the remainder of this Order.

Attorney's Fees

Plaintiff is subject to the provisions of 42 U.S.C. §2000e-16, that part of Title VII which governs civil actions brought by federal employees. Under the section, a federal employee may be awarded reasonable attorneys' fees as a prevailing party in a Title VII employment

discrimination case.[1] Plaintiff failed to invoke in his brief the relevant statutory authority under which this Court may award him such fees, but defendant in his brief acknowledged the applicability of the statute.

Plaintiff contends that he is entitled to an award for all attorneys' fees incurred during the course of this litigation under the standard set for determination of a "prevailing party" in *Texas State Teachers Ass'n. v. Garland Indep. School Dist., et al.*, 489 U.S. ___, 103 L. Ed.2d 866 (1989). Under *Garland*, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 103 L. Ed.2d at 878. "[I]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 877. (citation omitted)

Plaintiff claims that he succeeded on several "significant issues" in the litigation which entitle him to a fee award under *Garland*. Those issues, as enumerated by plaintiff, include granting of his motion for partial summary judgment on the trial *de novo* issue, the Court's finding that the filing of his suit in federal court was

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[1] 42 U.S.C. §2000e-16 provides that civil actions brought by federal employees shall be governed by 42 U.S.C. §2000e-5(f) through (k). §2000e-5(k) provides that a prevailing party may seek and recover reasonable attorneys' fees as part of that party's costs. Thus, Congress has provided a specific waiver of sovereign immunity to allow a federal employee to collect his reasonable attorneys' fees in a successful Title VII action against the United States.

appropriate under relevant federal law and retention of jurisdiction by the Court following summary judgment to address possible questions of defendant's good faith assignment of plaintiff to a higher level position as ordered by the Court. Plaintiff does, however, acknowledge that he failed to prevail on the issue of the adequacy of the remedy ordered by the EEOC prior to commencement of his federal suit. The Court provided the same remedy, in terms of the position to be awarded to plaintiff, as did the EEOC.

Defendant claims that plaintiff has failed on all fronts to achieve the status of prevailing party under the *Garland* standard. Defendant contends that the legal relationship of the parties was not materially altered by resolution of a dispute between the parties brought in this Court. Because plaintiff sought a greater remedy than that afforded in the EEOC final decision, and failed to achieve that remedy, defendant claims that plaintiff cannot be entitled to a fee award as a prevailing party. Plaintiff remains in the exactly the same legal position in relation to defendant as he experienced prior to commencement of his suit. Under the *Garland* analysis, plaintiff cannot recover attorneys fees as the prevailing party.

If the issue of the adequacy of the EEOC remedy were the only issue raised by plaintiff and decided by this Court, defendant's position would be correct. However, plaintiff sought enforcement of the EEOC's decision finding discrimination, upon which the remedy was based. Once plaintiff's suit was filed in this Court, defendant sought a trial *de novo* on the issue of liability, which was contested by plaintiff. Upon entry of the Court's order granting summary judgment to plaintiff on this issue,

plaintiff became the prevailing party on that question. Defendant claims that plaintiff's "disjointed procedural victory" which permitted *de novo* review of the EEOC remedy but not of liability, did not achieve any benefit sought by plaintiff in the bringing of his lawsuit. While it is true that the liability issue was decided by the EEOC in plaintiff's favor and this Court was required to adopt that finding,[2] the Court's finding that plaintiff was entitled to summary judgment as to liability *without a trial de novo* resulted in plaintiff "achiev[ing] some of the benefit . . . sought in bringing suit." 489 U.S. at ___, 103 L. Ed.2d at 877. (citation omitted) By bringing his suit in this Court, plaintiff sought the benefit of a federal court order that defendant had discriminated against him because of his race. Defendant contested the propriety of that order when he sought *de novo* review of the discrimination finding. The Court found for plaintiff and against defendant on the question, thereby making plaintiff the prevailing party *on that issue.*

The procedural history of this case allows division of plaintiff's claim into two parts, the first part being the issue of liability, determined for plaintiff by summary judgment and the second part being the issue of adequacy of the EEOC remedy, decided for defendant on a second summary judgment order. Once plaintiff prevailed on the discrimination issue, the sole remaining

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[2] In its Order of February 8, 1989, this Court adopted the reasoning of *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986), *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986) and *Haskins v. United States Dept. of the Army*, 808 F.2d 1192 (6th Cir. 1987) and found that the Court was bound by the EEOC's unequivocal findings of discrimination. Order of Feb. 8, 1989 at 9.

issue was that of the adequacy of the EEOC remedy. Plaintiff did not prevail on that issue and therefore cannot recover attorney's fees incurred as a result of litigation of that issue. In direct contrast to the discrimination question, plaintiff clearly sought a greater remedy than that ordered at the administrative level. When the Court entered summary judgment for defendant on the remedy issue, permitting plaintiff only promotion to a grade level already ordered by the EEOC, defendant became the prevailing party *on that issue,* foreclosing plaintiff's recovery of fees. Under *Garland,* the legal relationship of the parties underwent no material alteration on that issue nor did plaintiff succeed on the significant issue of appropriateness and adequacy of the EEOC remedy. The Court does not find that the other issues plaintiff claims to have prevailed upon held a significance worthy of recognition under the *Garland* standard.

Neither party has addressed the award of attorney's fees by the EEOC to plaintiff. The Court finds that it is appropriate to adopt the EEOC's order to that effect under applicable law. *Parker v. Califano,* 561 F.2d 320 (D.C. Cir. 1977).

For the reasons stated above, the Court finds that plaintiff is entitled to attorney's fees incurred during administrative proceedings on his employment discrimination claim prior to commencement of suit in this Court. The Court further finds that plaintiff is entitled to his attorney's fees incurred in the litigation of his claim in this Court from commencement of his suit on June 30, 1987 up to and including February 8, 1989, the date on

which partial summary judgment was entered for plaintiff on the issue of *de novo* review of his racial discrimination claim. Any fees incurred following February 8, 1989 are not recoverable by plaintiff.

Accountant's Fees

Plaintiff contends that as the prevailing party, he is entitled to recover expenses incurred for retention of a certified public accountant in the amount of $8,300.00. Plaintiff states that the accountant was hired to compute the amount of backpay, including interest, to which plaintiff was entitled from the period when the discrimination commenced, February 6, 1978, until July 1, 1990. No Court order was entered directing retention of this expert at plaintiff's request.

Plaintiff's support for his claim consists of two cases, *Foster v. Simon*, 467 F.Supp. 533 (W.D.N.C. 1979) and *Brown, et al. v. Gillette Co.*, 536 F.Supp. 113 (D. Mass. 1982). *Foster* merely allowed, in a Title VII case, "litigation expenses" to plaintiff's attorney as part of a fee award. The Court made no explanation of the reason for the award nor were the specifics of the expenses broken down. It is likely that the costs were reimbursement for the out-of-pocket expenses paid by the attorney during the litigation. There was no indication that any of the expenses were for expert fees. In *Brown*, a Title VII class action case, the parties entered into a court approved settlement but were unable to agree on attorneys' fees. The Court awarded one of plaintiffs' counsel $149,073.27 in expense reimbursement, including costs associated with computer and statistical experts and for the services

of a labor economist. The Court found that those expenses were items properly billed to a client, but no other explanation was given for the award. Neither case provides strong support for plaintiff's claim for these expert fees.

Defendant contends that under applicable case law, there is no statutory authority to award plaintiff expenses incurred for accountant fees. Under Rule 54(d) Fed. R. Civ. P., the Court shall allow costs to the prevailing party as of course, unless otherwise directed, but as against the United States agencies, "only to the extent permitted by law." Statutory authority for assessment of costs is found in 28 U.S.C. §1920, which provides that a court "may" assess as costs certain specifically enumerated expenses including, among others, compensation to *court appointed* experts. Defendant cites to a number of cases which have interpreted Rule 54(d) and §1920 as providing exclusive authority for assessment of costs. In *Euler v. Waller,* 295 F.2d 765 (10th Cir. 1969), the court reversed a district court award to plaintiff of expenses associated with preparation by a surveyor of a map as a trial exhibit. Plaintiff had failed to request a court order for the exhibit as a necessary and essential one for court or jury consideration and so the court refused to assess the expense as a cost. *Accord, Union Carbide & Carbon Corp. v. Nisley, et al.,* 300 F.2d 561 (10th Cir. 1962) and *Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir. 1989) (research and analysis for preparation of trial exhibit not recoverable as costs under Rule 54(d) or §1920). This Court adopts the reasoning in those cases that §1920 provides the express statutory authority for assessment of costs against the United States as provided in Rule 54(d). Accordingly, plaintiff's

request for accountant fees as part of his costs is hereby denied.

Interest on Backpay

Plaintiff has not specifically briefed the issue of interest on his backpay award, but in an earlier pleading, cited as support for this issue 5 U.S.C. §5596 (The Backpay Act). That statute provides that interest may be awarded on backpay due to a federal employee who has "been affected by an unjustified or unwarranted personnel action." Plaintiff's retained accountant calculated the backpay award including interest as directed in the statute.

Defendant claims that plaintiff is not entitled to interest on backpay for two reasons. First, defendant contends that The Backpay Act is inapplicable to Title VII cases brought by federal employees and has provided the Court with a copy of a memorandum prepared on the subject by William P. Barr, Assistant Attorney General, Office of Legal Counsel, dated September 18, 1989. That memorandum concludes that The Backpay Act may not be used to supplement Title VII remedial provisions which do not include interest because the cause of action *and* remedial provisions of Title VII are exclusive as to the substantive rights created by Title VII. The Assistant Attorney General cites Supreme Court decisions to support this conclusion, *Brown v. GSA*, 425 U.S. 820 (1976) and *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). *Brown* and *Novotny* held that §1981 and §1985 may not be used by federal employees either for causes of action or remedial actions in place of,

or together with, the cause of action and remedy provided by Title VII. In other words, a federal employee plaintiff may not sue under Title VII for employment discrimination but rely on another federal statute for provision of the relief to be accorded upon a liability finding. This is exactly what plaintiff in this case is attempting to accomplish. This Court concludes that The Backpay Act may not be applied to this case to provide plaintiff interest on his backpay award.

The second ground upon which defendant claims inapplicability of The Backpay Act is that the statute explicitly stated that the 1987 amendment which provided for interest would take effect on the date of the Act's amendment (December 22, 1987) and apply to employees whose final decision was rendered after the effective date. Plaintiff's final EEOC decision was rendered May 26, 1987, prior to the amendment's effective date. For both reasons stated by defendant, plaintiff is not entitled to interest on backpay.

Conclusion

In order to expedite the final resolution of this case, the parties are hereby ordered to submit to this Court a proposed form of final judgment, to comply in all respects with that ordered by Judge Oliver in his Order of December 22, 1989. Further, the parties shall include in the judgment attorney's fees incurred by plaintiff for the period during which his administrative proceeding was conducted by EEOC as well as for the period from commencement of this suit up to and including February 8, 1989. The judgment shall include the amount of backpay,

calculated without interest, to which plaintiff is entitled according to the Court's Order of December 22, 1989. The parties shall submit their proposed form of judgment on or before December 28, 1990.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
Senior U.S. District Judge

Dated: November 20, 1990

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

91-2908WMKC

Reginald T. Huey,	*	
Appellant,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and
	*	Suggestion for
Louis W. Sullivan, M.D.,	*	Rehearing En Banc
Secretary of Health	*	
and Human Services,	*	
	*	
Appellee.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

January 28, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

No. 92-1774

JUL 7 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

REGINALD T. HUEY, PETITIONER

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Sections 113 and 114 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079, apply to cases that were pending on the date of enactment.

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1774

REGINALD T. HUEY, PETITIONER

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 971 F.2d 1362. The opinion of the district court (Pet. App. A13-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on January 28, 1993. Pet. App. A25. The petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is employed by the Department of Health and Human Services (HHS). In 1978, he filed an administrative complaint alleging that he had been discriminated against on the basis of his race when HHS did not select him for promotion to any of twelve GS-12 positions for which he had applied. HHS determined that there had been no improper discrimination. Petitioner appealed to the Equal Employment Opportunity Commission (EEOC), which remanded to HHS for additional factfinding. On remand, HHS held that petitioner's allegations as to seven of the positions were untimely. As to the remaining five positions, HHS again found that there had been no improper discrimination. HHS noted, however, that numerous records relating to the selection decisions had been destroyed. Pet. App. A2.

On petitioner's second administrative appeal, the EEOC upheld HHS's determination that petitioner's challenge was untimely as to seven of the positions. As to the other five positions, however, the EEOC ruled against HHS on the basis of the missing documents. The EEOC ordered HHS to promote petitioner to a GS-12 position that was substantially equivalent to any of those five positions. In addition, the EEOC awarded petitioner back pay and attorney's fees. Pet. App. A2-A4.

Petitioner then brought this Title VII action for enforcement of the EEOC's order. See 42 U.S.C. 2000e-16. Petitioner also sought interest on his back pay award and reimbursement for fees that he had paid to an accountant to calculate the amount of back pay due. The district court granted enforcement of the EEOC's order, but denied petitioner's claims for interest and accountant's fees. Pet. App. A4-A5.[1]

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[1] The court agreed with the government that HHS, not petitioner, had the right to select a specific position for petitioner.

Petitioner appealed from the denial of his claims for interest and accountant's fees. The court of appeals affirmed. Pet. App. A1-A12. The court explained that the law at the time of the district court's decision did not provide for interest on the back pay award or for reimbursement of accountant's fees. *Id.* at A6, A8-A11. The court also rejected petitioner's argument that interest and accountant's fees were available in this case under Sections 113 and 114 of the Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 113 and 114, 105 Stat. 1079. The court held that those provisions, which were enacted while petitioner's appeal was pending, applied prospectively only. Pet. App. A7-A8 & n.5. The court observed that "the policy requiring that waivers of sovereign immunity be construed strictly in favor of the United States * * * makes a finding of no retroactivity even more compelling in this case." *Id.* at A7-A8. See also *id.* at A8 n.5.[2]

DISCUSSION

Section 113 of the Civil Rights Act of 1991 provides that the term "attorney's fee" in Title VII's attorney's fees provision includes "expert fees." 105 Stat. 1079 (amending 42 U.S.C. 2000e-5(k)). Section 114 of the Act provides that, in Title VII actions against the government, "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." 105 Stat. 1079 (amending 42 U.S.C.

Pet. App. A4. In addition, the court awarded petitioner some but not all of the attorney's fees that he incurred in the district court proceeding. *Ibid.*

[2] The court of appeals rejected the government's contention that it lacked appellate jurisdiction. Pet. App. A5-A6. The court also agreed with the district court that petitioner was entitled to only a portion of his attorney's fees incurred in the district court proceedings. *Id.* at A11-A12.

2000e-16(d)). Petitioner contends that he is entitled to accountant's fees and interest on his back pay award under these provisions.

The petition should be held pending this Court's disposition of *Landgraf* v. *USI Film Products*, No. 92-757, and *Rivers* v. *Roadway Express, Inc.*, No. 92-938. In those cases, the Court has granted certiorari on the question whether Sections 101 and 102 of the Civil Rights Act of 1991, 105 Stat. 1071-1072, 1072-1074, apply to claims that were pending before the statute's enactment. The United States and the EEOC have filed a brief in *Landgraf* and *Rivers* as *amici curiae* arguing that (1) textual analysis of the Act leads to the conclusion that, except as otherwise specifically provided, the Act generally applies to pending cases, and (2) even in the absence of clear evidence of congressional intent, it is proper for courts to presume that procedural and remedial provisions apply to pending cases. 92-757 U.S. Br. at 12-21.[3]

This case differs in some respects from *Landgraf* and *Rivers*. The defendants in *Landgraf* and *Rivers* are private parties, while this case is an action against the government. As the court of appeals noted (Pet. App. A7-A8), considerations of sovereign immunity may be pertinent to the retroactivity analysis. See 92-757 U.S. Br. at 21 n.11 (noting that the presumption that procedural and remedial provisions apply to pending cases may not apply in actions against the government, because statutory waivers of sovereign immunity are strictly construed and must be express rather than implied). In addition, this case concerns Sections 113 and 114 of the Civil Rights Act of 1991; *Landgraf* and *Rivers* concern Sec-

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[3] The government took a different position before the court of appeals in this case. As we explain in our brief in *Landgraf* and *Rivers*, the government has reexamined its position. 92-757 U.S. Br. at 9 n.2.

tions 101 and 102 of that Act. Despite these differences, this Court's resolution of the question presented in *Landgraf* and *Rivers* may have a significant bearing on the proper disposition of this case. We therefore agree with petitioner that it would be appropriate to hold this case pending the outcome of *Landgraf* and *Rivers*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Landgraf* v. *USI Film Products*, No. 92-757, and *Rivers* v. *Roadway Express, Inc.*, No. 92-938, and then disposed of in light of the decisions in those cases.

Respectfully submitted.

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